BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Applications Filed for the	)	DA 11-1019
Transfer of Control of	)	IB Docket No. 11-78
Global Crossing Limited to	)	
Level 3 Communications, Inc.	)	

PAC-WEST'S COMMENTS

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Applications For Consent to	)	WT Docket No. 11-65
Transfer Of Control Filed By AT&T, Inc.	)	DA 11-799
And Deutsche Telekom AG	)	File Nos. 0004669383 *et al*.

PAC-WEST'S COMMENTS

Pac-West Telecomm, Inc. ("Pac-West"), by and through counsel, files these Comments in response to the Public Notice[1] released June 9, 2011 in this docket. Pac-West is a competitive local exchange carrier ("CLEC") that provides interstate and intrastate exchange access service, as well as local, long-distance and enhanced services on a wholesale basis to communication service providers. These comments address the ongoing anticompetitive practices of both Global Crossing Limited ("Global Crossing") and Level 3 Communications, Inc. ("Level 3") (collectively, the "Applicants"), and their related subsidiaries, that the Commission should address before approving the carriers' applications for approval to transfer control of their various licenses and authorizations enumerated in the Public Notice.

I. INTRODUCTION

The merger of any carriers requires close scrutiny to ensure that the increased market power of the new entity will enhance competition, not decrease it. As the Commission has recognized, "the same consequences of a proposed merger that are beneficial in one sense may be harmful in another."[2] Specifically, "combining assets may allow the merged entity to reduce

---

1 *Applications Filed for the Transfer of Control of Global Crossing Limited to Level 3 Communications, Inc.*, DA 11-1019, (rel. June 9, 2011).

2 *In re: SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control,* 20 FCC Rcd. 18290, ¶ 18 (2005) ("AT&T/SBC Merger Order")

transaction costs and offer products, but it also may create market power, create or enhance barriers to entry by potential competitors, and create opportunities to disadvantage rivals in anticompetitive ways."[3] As both a customer and a competitor of the Applicants, Pac-West is acutely concerned that the merged entity will simply use its increased market power to discriminate against smaller CLECs such as Pac-West unless the Commission imposes conditions on the merger in order to produce benefits to consumers and to safeguard competition. These conditions should not only require the Applicants to cease their anticompetitive and unlawful behavior described below, but also ensure that the merged entity abides by its common-carrier duties going forward.

II. SHOULD THE COMMISSION APPROVE THE MERGER, IT SHOULD REQUIRE THE COMBINED ENTITY TO COMPENSATE CLECS FOR THE USE OF THEIR NETWORKS

Both Global Crossing and Level 3 offer toll-free ("8YY") service, but have different perspectives on their obligations to compensate downstream LECs that enable the Applicants to provide this service. Level 3 has taken the position that it doesn't have to compensate LECs like Pac-West for the work they perform in a typical 8YY call flow (*i.e.*, local switching, database queries, and transport), while Global Crossing simply pays what it itself deems proper, without regard to the Commission's rules and LECs' Commission-approved tariffs. While Global Crossing has been willing to reach a reasonable settlement on unpaid charges for the services it takes from LECs, Pac-West anticipates that the combined entity will adopt Level 3's "worst practices" and refuse to make payments at lawful, tariffed rates for such services. Neither company pays tariffed rates, and neither will even enter into a contractual agreement, as many

---

[3] *Id.*

other major IXCs have done, to establish lower rates that are at least paid out on a regular and reliable basis.

Toll-free service is, by definition, a "called party pays" service, whereby interexchange carriers – here, the Applicants – announce to all other carriers (and their customers) that they will pay all of the access charges associated with bringing those calls to their retail customers.[4] The Commission's rules state that, with respect to toll-free traffic, "the toll charges for completed calls are paid by the toll free subscriber."[5] Thus, common carriers, such as Pac-West, are obligated to carry this traffic and are precluded from recovering charges from the person making the toll-free call – that is exactly what makes the call "toll free."

The Applicants are then subject to a LEC's tariffed access charges for such traffic. As the toll-free service provider, and responsible organization, or RESPORG, the Applicants have effectively announced to all carriers that they are soliciting any carrier to transport 8YY traffic to the Applicants for ultimate delivery to the Applicant's 8YY customers, who pay Level 3 and Global Crossing a premium for that interexchange service. Indeed, LECs like Pac-West have no way of avoiding the expenses associated with the Applicant's 8YY traffic, for it is not until Pac-

---

[4] The FCC's rules state that, with respect to toll-free numbers, "the toll charges for completed calls are paid by the toll free subscriber." 47 C.F.R. § 52.101(f). *See also Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd. 9923 at ¶ 11 n.17 (2001) ("*Seventh Report and Order*") ("The Commission noted that, in some case, such as 800 and 888 service, the called party, which pays for the call, is unable to influence the calling party's choice of provider for originating access services.") (citation omitted).

[5] 47 C.F.R. § 52.101(f). *See also Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd. 9923 at ¶ 11 n.17 (2001) ("*Seventh Report and Order*") ("The Commission noted that, in some case, such as 800 and 888 service, the called party, which pays for the call, is unable to influence the calling party's choice of provider for originating access services.") (citation omitted).

West has their 8YY traffic in its switch and performs the necessary SMS/8YY database query service that it even learns that it is carrying a call for which the Applicants are the "responsible" organizations.

The Commission has always treated 8YY traffic as access traffic subject to LECs' access tariffs.[6] The *only* issue the Commission indicated it might need to revisit vis-à-vis the application of CLECs' access tariffs to IXCs' 8YY traffic were any instances of "illegitimate levels of 8YY traffic coming from a particular end-user," which the Commission said it would address on "a case-by-case basis" *via complaints filed by IXCs*, not by unilateral, illegal self-help by the IXCs.[7] To be sure, the Applicants never complained that any of the 8YY traffic it has

---

[6] *See, e.g., Seventh Report & Order*, 16 FCC Rcd. 9923, ¶ 56 ("We will apply the benchmark for both originating and terminating access charges. That is, it will apply to tariffs for both categories of service, including to toll-free, 8YY traffic, and will decline toward the rate of the competing ILEC for each category of service… [W]e decline to do as AT&T suggests and immediately detariff this category of CLEC services above the rate of the competing ILEC."); *id*. at ¶ 104 ("A CLEC provides a closely similar service and uses similar or identical facilities, regardless of whether it provides originating 8YY service, or terminating or originating access service for conventional 1+ calls."); *see also Eighth Report and Order and Fifth Order on Reconsideration*, 19 FCC Rcd. 9108, ¶¶ 64-72 & n.230 (2004) ("*Eighth Report and Order*") (treating all 8YY traffic as access traffic); *id*. at ¶ 72 (rejecting "AT&T's request that we adopt a separate competitive LEC access rate for outbound 8YY access traffic carried over dedicated local access facilities," reasoning that "[w]hen there are no intermediate carriers between the competitive LEC and the end-user, the fact that the end-user may provide some portion of the facilities would seem to be irrelevant.").

[7] *Eighth Report & Order*, 19 FCC Rcd. ¶ 71 & n.259. The U.S. District Court for the Eastern District of Virginia recently chastised Sprint for similar self-help tactics, stating "Sprint's justifications for refusing to pay access on VoIP-originated traffic, and its underlying interpretation of the ICAs, defy credulity. The record is unmistakable: Sprint entered into contracts with Plaintiffs wherein it agreed to pay access charges on VoIP-originated traffic. Sprint's defense is founded on post hoc rationalizations developed by its in-house counsel and billing division as part of Sprint's cost cutting efforts, and the witnesses who testified in support of the defense were not at all credible." Memorandum Opinion, *Central Telephone of Virginia, et al. v. Sprint Communications Co. of Virginia, Inc. et al*., U.S. District Court, Eastern District of Virginia, Richmond Division, Civil Action No. 3:09-cv-720, at 3 (March 2, 2011).

received from Pac-West is "illegitimate." The Applicants, which have a monopoly on their 8YY customers just as a LEC does when terminating 1+ traffic to its customers, simply want to take the downstream LECs' access services for free and reap higher margins as a result.[8] Indeed, if the Applicants do not want to receive – and pay for – these calls, their only proper recourse is to cease their provision of 8YY service, in which case they will no longer have an obligation to compensate Pac-West, or anyone else, for delivering toll-free calls to their customers.

As stated above, Pac-West is concerned that the merged entity will simply use its increased market power to further discriminate against smaller CLECs, such as Pac-West, unless the Commission imposes conditions on the merger in order to produce benefits to consumers and to safeguard competition. The practices of Level 3, the controlling entity, are the "worst practices" and absent Commission conditions, will prevail. But even Global Crossing is not willing to pay tariffed charges or agree to a rate schedule that they would be willing to meet. These conditions should not only require the combined entity to cease its anticompetitive and unlawful behavior described above, but also ensure that the merged entity abides by its common-carrier duties going forward.

CONCLUSION

For all the foregoing reasons, the Commission should deny the applications seeking to transfer control over Global Crossing to Level 3 unless the Applicants commit to abide by the Commission's rules and regulations and compensate CLECs for the work they perform in originating the Applicants' toll-free calls, which Level 3 currently refuses to do and Global

---

[8] *See, e.g., In re Connect America Fund et al.*, WC Docket No. 10-90 *et al*., Comments of Paetec Holding Corp., MPower Commc'ns Corp., U.S. Telepacific Corp. & RCN Telecom Servs., LLC, at 19-20 (filed Apr. 1, 2011).

Crossing only does under its own terms without regard to Pac-West's lawful tariff. Commission approval of the proposed transaction could not be lawful absent the imposition of such a condition designed to mitigate public interest harms and to ensure that competitors who actually abide by the Commission's rules can be assured of a level playing field.

Respectfully submitted,

/s/

Michael B. Hazzard
Adam D. Bowser
ARENT FOX LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
Tel. (202) 857-6000
Fax (202) 857-6395
Email: hazzard.michael@arentfox.com

Counsel to Pac-West Telecomm, Inc.